IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Writ Petition No.8571 of 2006

Baitullah Ismail Shaikh & anr. Petitioners

Vs.

Khatija Ismail Panhalkar & ors. Respondents

Mr.N.V.Walwalkar, Sr.Counsel with Mr.P.B.Shah for petitioners.

Mr.Uday P. Warunjikar for respondents.

CORAM: B.H.MARLAPALLE, J.

June 21, 2007.

P.C.

1. Heard Mr.Walwalkar, the learned Senior Counsel with Mr. Shah for the petitioners and Mr.Warunjikar for the respondents.

2. This petition impugns the order dated 6/10/2006 passed by the learned Civil Judge, Junior Division at Wai rejecting the application for amendment of the plaint filed at Exhibit 80 in Regular Civil Suit No.239 of 2002. By he said amendment the trial Court held that having regards to the provisions of Order VI Rule 17 the amendment was brought by way of afterthought, it was not a bona

fide exercise of statutory rights and the law laid down by this Court in the case of M/s. Mulji Lakhmidas vs. S.M. Kapadia **[2006 (3) All M.R. 52]** was in favour of the defendants. It further held that the amendment sought was only with an intention to provide an offshoot to the admissions made by the plaintiff in his cross-examination conducted on 28/1/2005.

3. Order VI, Rule 17 has been amended and brought into force from 1/7/2002, which reads as under:

> "**17. Amendment of pleadings. -** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the

party could not have raised the matter before the commencement of trial."

. It is, therefore, clear that no application for amendment can be allowed after the trial has commenced, unless the trial Court comes to the conclusion that inspite of due diligence the party could not have raised the amendment matter before the commencement of the trial.

4. In the instant case, there is no dispute between the parties that the trial of the suit had commenced and the following events would further clarify whether the application filed at Exhibit 80 was really the bona fide exercise of seeking to amend the plaint. The suit was filed on 7/8/2002 by the plaintiffs, the present petitioners and the defendants - present respondents filed Written Statement on 21/11/2002 at Exhibit 15 and amendment to the Written Statement at Exhibit 28 on 25/8/2004. The eviction suit was filed solely on the ground of bona fide requirements of the suit premises for starting an additional business. By the Written Statement originally filed and amended on 25/8/2004 it was contended by the defendants that the reason of

bona fide requirements was unsustainable and it was false on the grounds that the plaintiffs - landlord's son was employed, daughter-in-law was employed, he had other business establishments including a hotel, some bakery business was also there in addition to telephone booths. The plaintiff filed his affidavit by way of examination-in-chief on 8/3/2004 which came to be marked as Exhibit 33. Admittedly this affidavit by way of examination-in-chief was prior to the amendment to the W.S. on 25/8/2004. The plaintiff did not stop here. He proceeded to file a rejoinder so as to amend the plaint or reply the amendment to the W.S. on 13/9/2004 at Exhibit 37. He further filed an additional affidavit by way of examination-in-chief on 4/10/2004 at Exhibit 45. In the rejoinder as well as the additional affidavit filed after the amendment was allowed on 25/8/2004 in the Written Statement, he flatly denied, as was his case in the original plaint, that he had any alternative business or that his son was employed or that his daughter-in-law was employed as a teacher or that he had any business like bakery or telephone booths or a hotel. His cross-examination commenced and while he was under cross-examination on 28/1/2005, the learned Advocate of the Defendants

brought about all the admissions and more particularly the admissions about the alternative business, employment of the son, the daughter-in-law, the business in terms of a hotel, bakery and the telephone booths. The amendment application at Exhibit 80 was moved for the first time on 19th September 2006 i.e. almost after one year and eight months after he was cross-examined on 28/1/2005. Though it was not stated in this application at Exhibit 80, it has been stated in the petition memo before this Court for the first time that the plaintiff had changed his lawyer on 26/8/2006 as he did not take due steps for a long time and the new Lawyer suggested that by way of clarifications it was necessary to amend the plaint and, therefore, this application at Exhibit 80 was moved. As per Mr. Warunjikar, the learned counsel for the defendants, the plaintiffs had already changed two advocates and the amendment application at Exhibit 80 was filed by the third advocate.

5. Though it was stated that the amendments proposed were only by way of clarification, a perusal of paras 3 to 7 of this application at Exhibit 80 belies these contentions. This is a case where the

plaintiff - landlord exhibited his dishonesty and suppression of facts on more than one occasions. After the amendment was allowed to the W.S. on 25/8/2004 he filed Rejoinder on 13/9/2004 and filed affidavit on 4/10/2004 and on these two occasions he had the opportunity to correct the facts but he did not do so and when he was nailed down in his cross-examination on 28/1/2005, he did not deem it appropriate to take out an amendment application immediately. He waited for a long period of one year and eight months. Under these circumstances, the learned Judge of the trial Court was right in his observations that the requirements of Order VI, Rule 17 were not satisfied in moving this application for amendment to the plaint and it was only an exercise by way of an afterthought. The reasoning given by the learned Judge of the trial Court in support of the impugned order cannot be termed either as erroneous or perverse so as to cause interference in the same under the supervisory powers under Article 227 of the Constitution. Even though it is the petitioner's suit for seeking a decree of eviction, it cannot be said that the amendment application at Exhibit 80 was either moved with bona fide intentions or so as to make out a case under proviso to Order

VI, Rule 17 of CPC.

6. Hence this petition must fail and the same is hereby rejected summarily. Trial of the suit is expedited.

(B.H.MARL